

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)
(Negaunee, Michigan)

RM - _____

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

MAY 8 1996

RECEIVED

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To: Chief, Allocations Branch
Policy & Rules Division (Mass Media Bureau)

PETITION FOR RULE MAKING

Comes now **Todd Stuart Noordyk** ("Noordyk"), applicant for a new FM Construction Permit on Channel 258A at Negaunee, Michigan (FCC File No. BPH-951013MB), by Counsel, pursuant to §1.401 of the Commission's Rules, and hereby seeks the institution of a rule making proceeding to amend Section 73.202(b) of the Commission's Rules, the FM Table of Allotments, to add Channel 270A to Negaunee, Michigan, and order the amendment of his application to specify Channel 270A in lieu of Channel 258A while maintaining cut-off protection for his application.¹ Also, in the event that one or more expressions of interest are received in the course of this proceeding for an additional allotment at Negaunee, Michigan, it is noted that Channel 250A may

¹ In response to the Commission's "Report and Order" in MM Docket No. 95-29, DA 95-1646 (released July 31, 1995), both Noordyk and Goetz Communications Corporation ("Goetz")(FCC File No. BPH-951011MC) submitted mutually-exclusive competing applications for Negaunee. This rule making proposal seeks the resolution of the mutual-exclusivity by permitting the award of an FM Class A Construction Permit to both applicants.

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be allotted to Negaunee to accommodate those expressions of interest. Thus, the following changes are proposed to the FM Table of Allotments:

<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Negaunee, Michigan	258A	250A, 258A, 270A

The allotment of Channel 270A may be made at the site presently proposed in Noordyk's application -- namely, North Latitude 46 - 28 - 18, West Longitude 87 - 36 - 55. The allotment of Channel 250A (if required for any additional expressions of interest) may be made at the reference coordinates for Negaunee, Michigan of North Latitude 46 - 30 - 18, West Longitude 87 - 36 - 24. Attached to this petition as **Exhibit No. 1** is a channel study prepared by Jefferson G. Brock of Graham Brock, Inc. wherein it is demonstrated that each of the proposed channels is fully spaced in compliance with §73.207 of the Commission's rules.

In support of this petition, Noordyk submits the following:

1. This petition proposes to eliminate the mutual exclusivity between the two cut-off applications for new Class A FM facilities at Negaunee, Michigan. At the present time there is no basis upon which to either designate the applications for a comparative hearing, or to otherwise resolve the mutual exclusivity. *See e.g., Bechtel V. Federal Communications Commission, 74 RR 2d 348 (D.C. Cir. 1993).* By the allotment of Channel 270A to Negaunee,

Michigan, both pending applications may be granted. If any additional expressions of interest are filed for an additional channel, Channel 250A may be allotted to Negaunee, Michigan.

2. This petition is consistent with the following recent Commission rulings:

Report and Order, DA 95-2493 (MM Docket 95-138; RM-8684)(released January 26, 1996) at Casper, Wyoming.

Report and Order, DA 95-2494 (MM Docket 95-98; RM-8603)(released January 26, 1996) at Cheyenne and Saratoga, Wyoming.

Report and Order, DA 95-2492 (MM Docket 95-136; RM-8682)(released January 26, 1996) at Sioux Falls, South Dakota.

3. The Commission's recent decision in *Albion, Nebraska, 10 FCC Rcd. 3183 (1995)*, *app. for review denied, FCC 95-265 (released June 27, 1995)* is likewise consistent with the action requested here. In *Albion, Nebraska* a new television channel was allotted to Albion and a mutually exclusive applicant for another Albion channel was allowed to amend its application to the new channel without loss of cut-off protection.

4. The procedure proposed in this petition is also consistent with *Lander, Wyoming, 46 Fed. Reg. 39605 (published August 4, 1981)*. In *Lander, Wyoming*, the Commission had before it two pending applications for VHF-TV Channel 4 at Lander, Wyoming. One applicant was seeking a non-commercial

educational station on Channel 4, and the other applicant was seeking a commercial station on Channel 4. Funding for the non-commercial educational applicant was conditioned upon the use of Channel 4. The Commission held that the earliest initiation of service by the allotment of another channel would be the best solution to the proceeding. Accordingly, the Commission in *Lander, Wyoming* reserved Channel 4 for non-commercial educational use, allotted Channel 5 and allowed the commercial applicant to retain cut-off protection while amending its application to Channel 5. The Commission held that:

The retention of cut-off protection is warranted here since any other interested commercial applicant already had the opportunity to apply for a Lander station by the recent availability of Channel 4 and none expressed an interest in doing so.

5. A like situation exists in this Channel 258A proceeding at Negaunee, Michigan in which two mutually exclusive applicants have each applied for the same channel. The Filing Window has opened and closed. Any other applicants that may have had an interest in applying for a Class A station at Negaunee, Michigan have already had an opportunity to do so. On this basis alone, it is submitted that the allotment of an additional channel to Negaunee to allow both applicants to move forward while retaining cut-off protection would be fully consistent with the procedure established in *Albion, Nebraska* and *Lander, Wyoming*.

6. The public interest would be well served by the early initiation of service to Negaunee from both applicants. There would be a reduction in the

burdens on the Commission's processing resources by the elimination of the need for the designation for hearing of the mutually exclusive applications or the implementation of any alternative resolution method the Commission might ultimately adopt.²

7. In the event that an interest is expressed by any other party in providing additional service to Negaunee, Michigan, there is an additional channel that may be allotted to Negaunee, Michigan to accommodate such an interest. The allotment of such an additional channel is in the public interest in the event an expression of interest is filed in this proceeding for such an additional channel. See *e.g.*, *Modification of FM and Television Station Licenses*, 98 FCC 2d 916, 920 (1984). Making the additional channel available would be fully in accord with the strictures of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). As the Commission has noted in granting modification of licenses for existing stations to non-mutually exclusive channels, "the opportunity for filing for [an equivalent] channel is the only obligation [the Commission] must fulfill to comply with *Ashbacker*." See, *Helena, Montana*, 50 RR 2d 70, 71 (1981).

² A grant of the allotments and relief requested in this filing enables the settlement of the mutually exclusive proceeding between the two parties for Channel 258A. Commission precedent generally favors settlements as a way of reducing the time, cost and uncertainty of protracted litigation. See generally, *RKO General, Inc. (KHJ-TV)*, 3 FCC Rcd 5057 (1988).

8. Upon the allotment of Channel 270A to Negaunee, Michigan and the reservation of Channel 270A for the application of Noordyk with cut-off protection, Noordyk will promptly amend his application to specify Channel 270A and, when authorized, will promptly construct his new station on Channel 270 at Negaunee, Michigan.

9. Prior Petition for Rule Making: Previously, on February 9, 1996, Noordyk submitted a similar Petition for Rule Making whereby he sought the amendment of Goetz' application rather than his application. By letter dated April 8, 1996, the Commission denied the Petition but concomitantly advised Noordyk that he had "the option of requesting the amendment of [his] application ... to specify operation on an alternate channel at Negaunee." (See, **Exhibit No. 2**, attached hereto.) The instant Petition for Rule Making complies with the suggested directives of the Commission's April 8, 1996 letter.

10. It should also be noted that the Commission does not need to obtain Goetz' consent to act favorably upon this proposal. In response to Noordyk's previous Petition, Goetz filed Comments which indicated that there might not be enough economic support for two new radio stations at Negaunee. Despite Goetz' opinion, the public interest would be well served by the early initiation of service to Negaunee from both applicants. There would be a reduction in the burdens on the Commission's processing resources by the elimination of the need for the designation for hearing of the mutually exclusive applications or

the implementation of any alternative resolution method the Commission might ultimately adopt. In situations such as this, the Commission long ago made it clear that it does "not contemplate refusing an assignment on economic or competitive grounds." *See, Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 103 (1982) at para. 39.*

WHEREFORE, the above premises considered, it is respectfully requested that a rule making proceeding be commenced looking for the allotment of Channel 270A to Negaunee, Michigan, and a reservation of Channel 270A for the amended application of Noordyk in order to resolve the mutual exclusivity now existing on Channel 258A at Negaunee, Michigan.

Respectfully submitted,

TODD STUART NOORDYK

By: 
Cary S. Tepper

His Attorney

Booth, Freret & Imlay, P.C.
1233 20th Street, N.W.
Suite 204
Washington, D.C. 20554

(202) 296-9100

May 8, 1996

Exhibit No. 1
(Technical Statement of
Jefferson G. Brock)

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

**PETITION FOR RULEMAKING
ALLOT CHANNEL 270A
NEGAUNEE, MICHIGAN
May 1996**

TECHNICAL EXHIBIT

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PETITION FOR RULEMAKING
ALLOT CHANNEL 270A
NEGAUNEE, MICHIGAN
May 1996

TECHNICAL STATEMENT

1. This Technical Statement and attached exhibits were prepared on behalf of Todd Stuart Noordyk ("Noordyk"), an applicant seeking authority to construct a new FM radio station on Channel 258A at Negaunee, Michigan. In addition to the application filed by Noordyk during the filing window for Channel 258A at Negaunee, Goetz Communications Corporation filed a mutually exclusive application. No other applications were filed during this period.

2. In an effort to remove the mutually exclusivity between the two applicants at Negaunee, Noordyk has determined there are alternative Class A channels available for allotment to the community which would remove the conflict between the proposals. This would enable both Noordyk and Goetz to move forward with construction of a new FM facility at Negaunee. With no comparative hearings to resolve mutually exclusive applications, this instant petition for rulemaking will enable the institution of two new services in Negaunee.

3. Noordyk has determined that Channel 270A is available for allotment at Negaunee at the site specified in the Noordyk application (File #951013MB) at reference coordinates North Latitude 46° 28' 18" and West Longitude 87° 36' 55". Exhibit #1 is a §73.207 spacing study which indicates that at this reference site Channel 270A complies with the Commission's minimum distance separation requirements to all licensed, applied for or proposed facilities. Noordyk, therefore, requests that he be ordered to amend his application to specify Channel 270A in lieu of Channel 258A at Negaunee.

4. In order to provide an equivalent class channel for other potential expressions of interest, Noordyk has also determined that Channel 250A can be allotted to Negaunee, Michigan, at geographic coordinates North Latitude 46° 30' 18" and West Longitude 87° 36' 24".¹ Exhibit #2 is a usable area study which denotes where a transmitter site could be located for Channel 250A at Negaunee. Exhibit #3 is a §73.207 spacing study demonstrating that from the proposed reference site Channel 250A meets the Commission's minimum distance separation requirements to all licensed, applied for or proposed facilities. A 3.16 mV/m contour would be placed over all of Negaunee from the proposed reference site.

Therefore, Noordyk proposes the following amendment to §73.202(b) of the Commission's rules.

Negaunee, Michigan

Present	Proposed
258A	250, 258A, 270A ²

Noordyk requests that Channel 270A be allotted to Negaunee, Michigan, and that he be ordered to amend his pending application at Negaunee to specify operation on Channel 270A in lieu of Channel 258A. In addition, as indicated above, should there be expressions of interest in a Class A channel at Negaunee, Channel 258A can be allotted in compliance with the Commission's rules and regulations.

1) Without the imposition of a site restriction. This is the same reference site as the Channel 258A allotment site at Negaunee.

2) Channel 250A is proposed for other expressions of interest. Allotment of this channel would not be necessary if no interest was expressed during the comment period of this proceeding.

The foregoing Technical Statement was prepared on behalf of Todd Stuart Noordyk by Graham Brock, Inc., his Technical Consultants. All information contained herein is true and accurate to the best of our belief and knowledge. All data related to FM allotments was extracted from the NTIA database as updated on April 26, 1996. We assume no liability for errors or omissions in that database which may be adverse to the requests contained herein.

**ALLOCATION STUDY FOR NEGAUNEE, MICHIGAN
USING NOORDYK SITE AS REFERENCE**

REFERENCE	CLASS A	DISPLAY DATES
46 28 18 N		DATA 04-26-96
87 36 55 W	Current rules spacings	SEARCH 05-07-96
----- CHANNEL 270 -101.9 MHz -----		

CALL TYPE	CH# LAT	CITY LNG	STATE PWR	BEAR' HT	D-KM D-Mi	R-KM R-Mi	MARGIN (KM)
AD270	270A	Negaunee	MI	0.0	0.00	115.0	-115.00
AD	46 28 18	87 36 55	0.000 kw	0M	0.0	71.5	
Petition for Rule Making - Todd Stuart Noordyk							
WJNRFM	268C1	Iron Mountain	MI	204.7	79.56	75.0	4.56
LI CN	45 49 15	88 02 38	100.000 kw	187M	49.5	46.6	
Wheeler Broadcasting of Mich.					BLH-940815KC		
WDEZ	270C	Wausau	WI	223.8	236.40	226.0	10.40
LI CY	44 55 14	89 41 31	100.000 kw	328M	146.9	140.5	
WRIG, Inc.					BLH-940318KA		
WLDR	270C1	Traverse City	MI	141.0	241.21	200.0	41.21
LI CN	44 46 13	85 41 43	100.000 kw	192M	149.9	124.3	
Great Northern B/Casting System					BLH-920403KB		
WAAH.C	272C2	Houghton	MI	314.4	101.12	55.0	46.12
CP CN	47 06 13	88 34 04	36.000 kw	150M	62.8	34.2	
Houghton Radio Group of North Mi.					BPH-930426IA 970228		
>From Channel 272A Per D92-180							

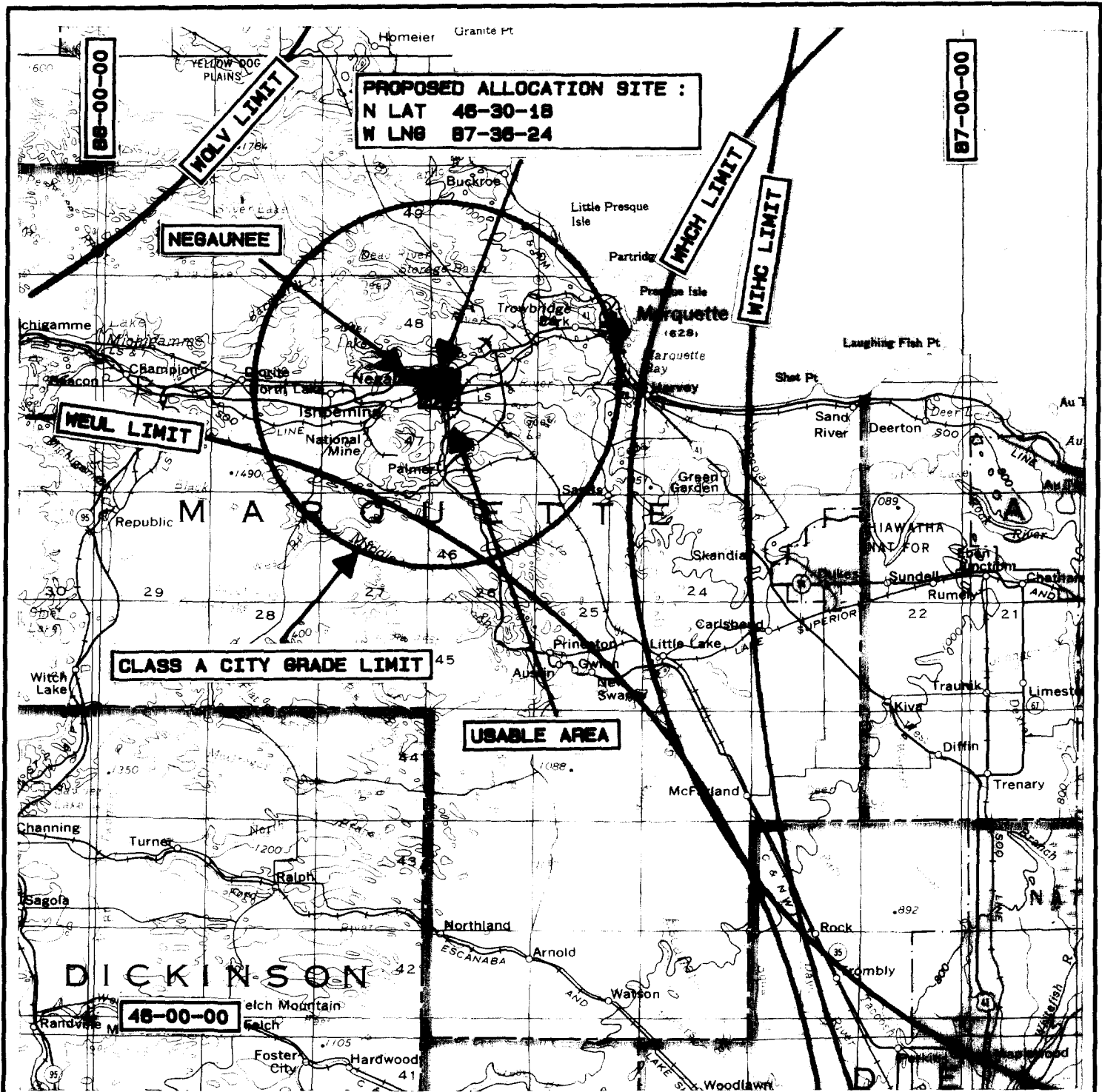
CHANNEL 270A SPACING STUDY

**EXHIBIT #1
PETITION FOR RULE MAKING
TODD STUART NOORDYK
ALLOT CHANNEL 270A
NEGAUNEE, MICHIGAN**

May 1996

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS



CHANNEL 250A USABLE AREA

MAP IS A PORTION OF THE 1: 500, 000 SCALE
U.S.G.S. BASE MAP OF MICHIGAN.

EXHIBIT #2

PETITION FOR RULE MAKING
TODD STUART NOORDYK
ALLOT CHANNEL 270A
NEGAUNEE, MICHIGAN

May 1996

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

**ALLOCATION STUDY FOR CHANNEL 250A NEGAUNEE, MICHIGAN
USING CITY CENTER COORDINATES AS REFERENCE**

REFERENCE	CLASS A	DISPLAY DATES
46 30 18 N		DATA 04-26-96
87 36 24 W	Current rules spacings	SEARCH 05-07-96
----- CHANNEL 250 - 97.9 MHz -----		

CALL TYPE	CH# LAT	CITY LNG	STATE PWR	BEAR' HT	D-KM D-Mi	R-KM R-Mi	MARGIN (KM)
AD250	250A	Negaunee	MI	0.0	0.00	115.0	-115.00
AD	46 30 18	87 36 24	0.000 kw	0M	0.0	71.5	
Petition for Rule Making - Todd Stuart Noordyk							
WEUL	251A	Kingsford	MI	206.3	83.27	72.0	11.27
LI CN	45 49 58	88 04 57	0.240 kw	147M	51.8	44.8	
Gospel Opportunities, Inc.						BLH-900214KA	
>Class B1 with respect to Canada							
WHCH	252C2	Munising	MI	97.7	72.34	55.0	17.34
LI CN	46 24 53	86 40 27	32.000 kw	109M	45.0	34.2	
Mid Pen Broadcasting, Inc.						BLH-920313KB	
WIHC	250C2	Newberry	MI	90.9	192.52	166.0	26.52
LI CN	46 26 58	85 06 04	50.000 kw	150M	119.7	103.2	
Cambrian Broadcasting Company						BLH-9601118K	
WOLV	249A	Houghton	MI	315.2	100.37	72.0	28.37
LI CN	47 08 27	88 32 26	0.880 kw	155M	62.4	44.8	
Desnick Broadcasting Company						BLH-800602AE	
>to Channel 242 - Class B1 with respect to Canada							

CHANNEL 250A SPACING STUDY

**EXHIBIT #3
PETITION FOR RULE MAKING
TODD STUART NOORDYK
ALLOT CHANNEL 270A
NEGAUNEE, MICHIGAN**

May 1996

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

AFFIDAVIT AND QUALIFICATIONS OF CONSULTANT

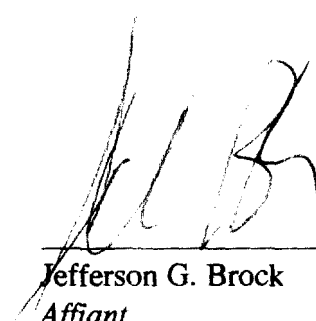
State of Georgia)
St. Simons Island) ss:
County of Glynn)

JEFFERSON G. BROCK, being duly sworn, deposes and says that he is an officer of Graham Brock, Inc. Graham Brock has been engaged by Todd Stuart Noordyk to prepare the attached Technical Exhibit.

His qualifications are a matter of record before the Federal Communications Commission. He has been active in Broadcast Engineering since 1979.

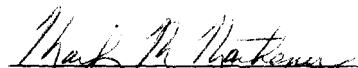
The attached report was either prepared by him or under his direction and all material and exhibits attached hereto are believed to be true and correct.

This the 7th day of May, 1996.



Jefferson G. Brock
Affiant

*Sworn to and subscribed before me
this the 7th day of May, 1996*



Notary Public, State of Georgia
My Commission Expires: September 12, 1999

Exhibit No. 2

(FCC Letter dated April 8, 1996)



Federal Communications Commission
Washington, D.C. 20554

APR 08 1996

Cary S. Tepper
Booth, Freret & Imlay, P.C.
1233 - 20th Street, N.W., Suite 204
Washington, D. C.

Dear Mr. Tepper:

This is in response to the petition for rule making you filed on behalf of Todd Stuart Noordyk on February 9, 1996. Therein you request the allotment of Channel 273A at Negaunee, Michigan, and amendment of the application of Goetz Communications Corporation to specify operation on Channel 273A in lieu of Channel 258A, while maintaining cut-off protection for the application. You also request the allotment of Channel 289A to Negaunee for other interests.

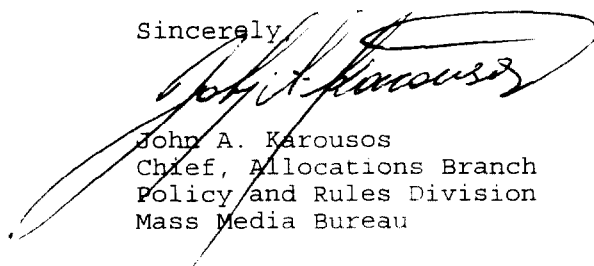
We have reviewed your proposal and find it unacceptable for rule making. You state that the allotment of the additional channels will eliminate the mutual exclusivity between two cut-off applications for a new Class A FM channel at Negaunee, Michigan, since at the present time there is no basis upon which to either designate the applications for a comparative hearing, or otherwise resolve the mutual exclusivity. However, the request is not for the amendment of Todd Stuart Noordyk's application but for the competing application filed by Goetz Communications Corporation ("Goetz"). Goetz has not participated in the filing of this petition and has expressed no interest in the allotment of Channel 273A or Channel 289A at Negaunee. Although two competing applications are on file for Channel 258A at Negaunee, we have no interest for Channel 273A or Channel 289A. It is Commission policy not to make allotments where no interest has been expressed.

On March 5, 1996, Goetz filed comments in response to your rule making proposal agreeing that the proposal conforms to the Commission's current policy of allotting additional channels to avoid a hearing but that it does not consider the economics of placing additional channels into the market. Goetz states that should the Commission determine it is in the public interest to allot additional channels to Negaunee, Goetz requests the reservation of Channel 289A for its use, as Channel 289A provides more flexibility in locating a new site than does Channel 273A.

Our engineering analysis indicates that Channel 273A can be allotted to Negaunee pursuant to Section 73.208(c)(8) of the Commission's Rules. Channel 289A at the site specified in Goetz's application, however, is short spaced to a one-step application filed by Station WCUP to substitute Channel 289C1 for Channel 289C2 at L'Anse, Michigan, on February 6, 1996 (BPH-960206IA). Applications are protected from conflicting rule making proposals on the date they are received at the Commission. See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 7 FCC Rcd 4917 (1992) and 8 FCC Rcd 4743 (1993).

In view of the above, we are returning your petition for rule making. It should be noted that you do have the option of requesting the amendment of the application of Todd Stuart Noordyk to specify operation on an alternate channel at Negaunee.

Sincerely,

A handwritten signature in dark ink, appearing to read "John A. Karousos", is written over the typed name and title. The signature is fluid and cursive, with a large loop at the end.

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

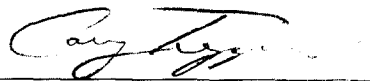
Enclosure

CERTIFICATE OF SERVICE

I, Cary S. Tepper, Esquire, hereby certify that on this 8th day of May, 1996, I have served a copy of the foregoing "**Petition for Rule Making**" first-class, postage-prepaid, on the following:

*John A. Karousos
Chief, Allocations Branch
Federal Communications Commission
2025 M Street, N.W.; Room 8010
Washington, D.C. 20554

Jerrold D. Miller, Esquire
Miller & Miller, P.C.
1990 M Street, N.W.
Suite 760
Washington, D.C. 20036
(Counsel to Goetz Communications Corporation)



Cary S. Tepper, Esq.

*/ indicates delivery by hand